

the duration of the M2A, *subject to the Supreme Court's review of the Commission's TELRIC rules.*"<sup>46</sup> Although the Commission has observed that ratemaking can be inherently uncertain because rates and underlying costs are constantly subject to some degree of change,<sup>47</sup> the level of instability here is hardly typical. Here, the rates in issue have been the subject of a U.S. Court of Appeals' decision finding them to be unlawful, and only the grant of *certiorari* by the Supreme Court has served (indirectly) to stay the issuance of the Circuit Court's mandate. To suggest in these rarefied circumstances that this is workaday uncertainty is wrong. The "permanent" rates upon which SWBT relies have as much, if not more, uncertainty surrounding them as those rates officially deemed "interim" by the Missouri PSC.

**C. SWBT's Interim Rates Are Not Reasonable And Thus Cannot Meet The Commission's Three-Prong Test.**

As noted, SWBT supports its application with (ostensibly) "permanent" rates that have been vacated by the Eighth Circuit. However, as demonstrated below, those (effectively) interim rates are inexplicably higher than comparable rates in other SWBT states. Thus, they fail the reasonableness prong of the Commission's test for interim rates. In addition, SWBT's application relies upon the Texas rates as interim Missouri rates for a number of categories. Where a BOC attempts to rely on another state's rates for Section 271 compliance, it bears the burden of establishing that the costs in the second state are at or above the costs in the state whose rates

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<sup>46</sup> See SWBT Br. at 28 n.32 (FCC Apr. 3, 2000), filed in Application by SBC for Provision of In-region, InterLATA Services in Missouri, CC Dkt. No. 01-88 (citing M2A General Terms and Conditions § 18.2) (emphasis added). The Commission has considered duration to be a critical indicator of whether rates are "permanent." See Kansas/Oklahoma Order ¶ 89.

<sup>47</sup> See Application of Verizon New England Inc. for Authorization to Provide In-region, InterLATA Service in Massachusetts, 16 FCC Rcd 8988, ¶ 36 (2001) ("Massachusetts Order") (fact that state commission may change rates in the future or that rates may "evolve over time to reflect new information on cost inputs and changes in technology or market conditions" does not cause an applicant to fail the checklist item today).

were adopted. Massachusetts Order ¶ 22. SWBT has not met its burden and thus adoption of the Texas rates on an interim basis is inappropriate.

In order to determine whether SWBT's vacated UNE rates are reasonable, the rates in Missouri were compared to those in Texas, Kansas, and Oklahoma. As the following chart reveals, there are substantial disparities between the Missouri rates and those held to be TELRIC-compliant in past Section 271 orders.

UNE	Missouri	Texas		Kansas		Oklahoma	
	NRC	% MO is higher	NRC	% MO is higher	NRC	% MO is higher	NRC
2W Digital (urban)	43.33	188%	15.03	188%	15.03	-29%	60.61
Digital Loop to Collo 2W	26.87	469%	4.72	55%	17.29	-11%	30.25
DS1 Trunk Port (urban)	121.79	74%	69.95	0%	121.50	-15%	144.09
<u>Multiplexing</u>							
VG to DS1	195.00	101%	96.84	101%	96.84	46%	133.59
DS1 to DS3	1029.00	32%	777.51	32%	777.51	32%	777.51
<u>SS7 &amp; Links</u>							
<u>Cross Connects</u>							
STP to Collo DS0	224.85	234%	67.24	198%	75.39	69%	133.02
STP to Collo DS1	192.75	157%	75.12	157%	75.12	65%	116.96

As the Commission has recognized, costs may vary from state-to-state “due to differences in terrain, population density, and labor costs.” Michigan Order ¶ 291. It does not appear that any of these factors explain the magnitude of the differences between SWBT's rates in Missouri as compared to these other states. For example, a comparison of labor charges in the x2As reveals

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\* This column reports what percentage the Missouri rate is of the Texas rate, and is computed by subtracting the Texas rate from the Missouri rate, dividing by the Texas rate, and multiplying by 100 to state a percentage. For example, where the Texas rate is \$15 and the Missouri rate is \$30, this column would report that the Missouri rate is 100% higher than the comparable Texas rate  $((\$30-\$15)/\$15 \times 100\%)$ . This example alternately could be described as the Missouri element costing twice as much as the identical Texas element. The same calculation is made for the other columns, with the x2A rate for that state being substituted in the equation.

that the rate for Missouri (\$30.93 per half hour) is less than the comparable rate for Texas (\$42.88), Oklahoma (\$37.11), and Kansas (\$46.76).

Other possible benchmarks also indicate that these rate disparities are not cost-based. Using USF estimates for average monthly cost per line, Missouri's costs do not vary more than 12% from any of the other three states shown.<sup>48</sup> Similarly, using the differentials from the Commission's Local Competition Order proxy rates, Missouri's rates should not vary more than 15% from those for Kansas, Oklahoma, and Texas.<sup>49</sup> Indeed, SWBT's affiant Thomas J. Makarewicz concedes that, even after all of SWBT's "voluntary" reductions, Missouri urban loop rates still "would not be considered compliant with TELRIC when compared with Kansas" under the USF cost model.<sup>50</sup> These unexplained disparities suggest that the vacated "permanent" Missouri rates are neither cost-based nor reasonable.

SWBT further relies upon the Texas rates as interim Missouri rates for a number of categories, including line sharing and loop conditioning charges as well as the "other" 95 UNE rates discussed above. Where a BOC attempts to rely on another state's rates for purposes of

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<sup>48</sup> Averaging the USF investment input unit costs for total monthly cost per line for SWBT reveals the following average monthly cost per line for Missouri (\$53.63), Kansas (\$51.13), Oklahoma (\$59.56), and Texas (\$47.25). Texas' and Kansas' costs were thus 12% and 5% lower, respectively, than the average monthly cost per line for Missouri, while Oklahoma's costs were 11% higher.

<sup>49</sup> Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, 11 FCC Rcd 15499 (1996) (rule codified at 47 C.F.R. § 51.513(c)(1)). The proxy-based monthly loop rates for each state are: Missouri, \$18.32; Kansas, \$19.85; Oklahoma, \$17.63; and Texas, \$15.49. Texas' and Oklahoma's rates are 15% and 4% lower, respectively, than the rate for Missouri, while Kansas' rate is 8% higher.

<sup>50</sup> Thomas J. Makarewicz Affidavit ¶ 10 (App. A - MO, Tab 15) ("Makarewicz Aff.") (noting further that the rates for Missouri suburban loops are 37% higher than those for Kansas, while the USF model predicts that Missouri's suburban loop costs exceed those of Kansas by only 8%). Not surprisingly, SWBT urges the Commission to conclude that the Missouri rates are cost-based despite these disparities. See generally Makarewicz Aff.

establishing a presumption that those rates are TELRIC-compliant, such reliance is appropriate “if costs are demonstrated to be at or above the costs in the state whose rates were adopted.”

Massachusetts Order ¶ 22. SWBT has made no such demonstration. For example, a primary input for SWBT’s costs is labor. Yet SWBT’s labor costs in Missouri (\$30.93 per half hour) are almost 40% less than its labor costs in Texas (\$42.88). Although the Commission’s USF model predicts that monthly line costs are higher in Missouri than in Texas, SWBT has urged the Commission not to rely on comparisons to the USF model because to do so would be “inappropriate and misleading.” See Makarewicz Aff. ¶ 7. Moreover, several CLECs have asserted that a comparison of the National Exchange Carrier Association (“NECA”) loop costs for SWBT reveals that its loop costs for Texas are higher than its costs for Missouri. See id. ¶ 12. Until SWBT establishes that its costs in Missouri are higher, it cannot rely on Texas rates for Section 271 compliance.

**D. Even With A Limited True-up, The Sheer Number Of Interim Rates Alone Is Fatal To SWBT’s Application.**

SWBT claims that the Commission should not worry about interim rates because the true-up period is limited to six months and because 102 of the 136 interim rates from Case No. TO-98-115 are set at zero. SWBT Br. at 44-45. Besides the fact that SWBT’s true-up is insufficient, as noted above, SWBT cavalierly fails to appreciate the effect of interim rates -- including those set at zero -- on competitive entry. While zero may be a far more reasonable rate than the interim rate proposed by SWBT, it presents CLECs with a dilemma. To the extent that competitors reasonably believe that the Missouri PSC will adopt above-cost rates (*i.e.*, those proposed by SWBT), the use of interim rates cannot dispel the uncertainty and risk of entry. If the rates are set at SWBT’s proposed rates, then CLECs that have purchased those elements may face substantial true-ups. Such uncertainty often forces CLECs to delay or limit their entry.

The Commission has previously disregarded this concern, observing that CLECs face such uncertainty “only to the extent that they reasonably believe that they may in fact have a legal obligation to pay something greater than’ the rates that the state commissions now impose.” Kansas/Oklahoma Order ¶ 222 (citation omitted). Yet, this conclusion misses the point. It is not whether CLECs will ultimately have to pay prices that exceed zero, but rather the chilling effect that so many interim rates of zero -- no fewer than 102 in a single docket -- have on competitive entry that is the problem. Indeed, as the Commission has previously recognized, “[u]nreasonably high non-recurring charges for unbundled loops and other essential inputs can have as much of a chilling effect on local competition as unreasonably high recurring fees.” Michigan Order ¶ 296. The astonishing number of interim rates (136 in a single docket), coupled with the other factors discussed above, counsel against granting SWBT’s Missouri application.

This level of uncertainty -- which is far greater than that caused by the usual periodic review of rates by regulators -- effectively precludes CLECs from designing and implementing a rational business plan. In states such as Missouri, where CLECs cannot reasonably estimate the costs they will face, they cannot risk committing scarce financial resources to enter on any significant scale. This is especially true today when those resources are getting harder and harder to come by. Until these uncertainties are resolved and permanent rates are set, the Commission cannot find that SWBT has met the competitive checklist.

**V. CONCLUSION**

For the foregoing reasons, SWBT's application for Section 271 relief in Arkansas and Missouri should be denied.

Respectfully submitted,

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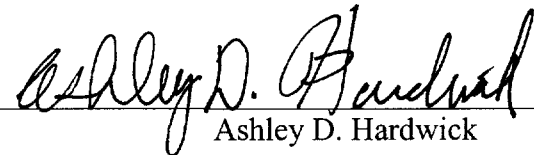
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**BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI**

In the Matter of the Application of )  
Southwestern Bell Telephone Company to )  
Provide Notice of Intent to File an )  
Application for Authorization to Provide )  
In-region InterLATA Services Originating )  
in Missouri Pursuant to Section 271 of the )  
Telecommunications Act of 1996. )

Case No. TO-99-227

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**STAFF'S SUMMARY OF EVIDENCE, COMMENTS AND POSITIONS**

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Dated: December 22, 2000

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***Does Southwestern Bell Telephone Company meet the requirements to seek in-region, inter-LATA authority in the state of Missouri by means of 47 U.S.C. § 271(CC)(1)(A) ("Track A")?***

***Yes.***

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***Does Southwestern Bell Telephone Company meet the requirements of Checklist Item 1?***

***No.***

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***Does Southwestern Bell Telephone Company meet the requirements of Checklist Item 2?***

***No.***

Checklist Item 3 – Poles, Ducts, conduits, and Rights of Way .....	16
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***Does Southwestern Bell Telephone Company meet the requirements of Checklist Item 3?***

***Yes.***

Checklist Item 4 – Unbundled Local Loops .....	17
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***Does Southwestern Bell Telephone Company meet the requirements of Checklist Item 4?***

***Yes.***

Checklist Item 5 – Unbundled Local Transport .....	22
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***Does Southwestern Bell Telephone Company meet the requirements of Checklist Item 5?***

***No. This is a change from the Staff's position as last stated. It has come to the attention of the Staff that certain rates have not undergone scrutiny by the Commission as to whether they are TELRIC-based and FCC guideline compliant.***

Checklist Item 6 – Unbundled Local Switching .....	24
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***Does Southwestern Bell Telephone Company meet the requirements of Checklist Item 6?***

***Yes.***

Checklist Item 7 – 911-E911 Access & Directory Assistance/Operator Services .....	25
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***Does Southwestern Bell Telephone Company meet the requirements of Checklist Item 7?***

***Yes.***

Checklist Item 8 – White Pages Directory Listings .....	27
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***Does Southwestern Bell Telephone Company meet the requirements of Checklist Item 8?***

***Yes.***

Checklist Item 9 – Number Administration .....	30
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***Does Southwestern Bell Telephone Company meet the requirements of Checklist Item 9?***

***Yes.***

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***Does Southwestern Bell Telephone Company meet the requirements of Checklist Item 10?***

***Yes.***

Checklist Item 11 – Number Portability .....	32
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***Does Southwestern Bell Telephone Company meet the requirements of Checklist Item 11?***

***Yes.***

Checklist Item 12 – Local Dialing Parity .....	33
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***Does Southwestern Bell Telephone Company meet the requirements of Checklist Item 12?***

***Yes. This is a change in the Staff's last stated position and is based on events that have taken place since November 30, 2000, namely, the implementation of the Commission's order in Case No. TO-99-483 regarding metropolitan calling areas.***

Checklist Item 13 – Reciprocal Compensation .....	35
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***Does Southwestern Bell Telephone Company meet the requirements of Checklist Item 13?***

***Yes.***

Checklist Item 14 – Resale .....	38
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***Does Southwestern Bell Telephone Company meet the requirements of Checklist Item 14?***

***No.***

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*Does Southwestern Bell Telephone Company meet the requirements of 47 U.S.C. § 272?*

*Yes.*

Public Interest.....	42
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*Does Southwestern Bell Telephone Company meet the requirement of 47 U.S.C. § 272(g)(2) that grant of the authorization is consistent with the public interest, convenience and necessity?*

*Yes.*

## OVERVIEW

### Statutory Framework

The Telecommunications Act of 1996 ("the Act") provides that Bell Operating Companies ("BOCs") or their affiliates may gain authority to provide interLATA telecommunications services originating inside the state in which the BOC, or any of its affiliates, was authorized to provide wireline telephone exchange service under the AT&T Consent Decree reorganization.<sup>1</sup> The requirements for obtaining this authority are found in section 271 of the Act; thus, this authority is commonly referred to as "section 271 authority."<sup>2</sup> Such authority must be obtained for each state, i.e., section 271 authority is available on a state-by-state basis.<sup>3</sup> Depending upon whether there is direct competition in the local market, section 271 authority may be sought by the procedure found in section 271(c)(1)(A) ("Track A") or the procedure found in section 271(c)(1)(B) ("Track B"). In addition, the BOC, or its affiliate, must comply with the competitive checklist found in section 271(c)(2)(B); the requirements found in section 272 of the Act; and must demonstrate that the entry of the BOC, or affiliate, into the long distance market is consistent with the public interest, convenience, and necessity.<sup>4</sup> The Federal Communications Commission ("FCC") makes the determination of whether the BOC, or its affiliate, has met the requirements for section 271 authority.<sup>5</sup>

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<sup>1</sup> 47 U.S.C. § 271(b)(1).

<sup>2</sup> 47 U.S.C. § 271.

<sup>3</sup> See 47 U.S.C. § 271(d)(1).

<sup>4</sup> *Application of SBC Communications Inc. et al. for Provision of In-Region, Inter-LATA Services in Texas*, CC Docket No. 00-65, FCC 00-238 (¶¶ 8 & 9), Memorandum Opinion and Order, \_\_\_ F.C.C.R. \_\_\_ (June 30, 2000) ("SBC Texas Order").

<sup>5</sup> See 47 U.S.C. § 271(d).



## Legal Standard

In its *SBC Texas Order*, the FCC has set forth its latest statement of the legal standard it applies to evaluate compliance with the competitive checklist requirements of section 271 of the Act. The pertinent paragraphs of the *SBC Texas Order* follow:

As part of our determination that SWBT has satisfied the requirements of section 271, we consider whether SWBT has fully implemented the competitive checklist in subsection (c)(2)(B). In demonstrating compliance with each item on the competitive checklist, a BOC must demonstrate that it has a concrete and specific legal obligation to furnish the item upon request pursuant to state-approved interconnection agreements that set forth prices and other terms and conditions for each checklist item, and that it is currently furnishing, or is ready to furnish, the checklist item in quantities that competitors may reasonably demand and at an acceptable level of quality.

....

. . . . In particular, the BOC must demonstrate that it is offering interconnection and access to network elements on a nondiscriminatory basis. . . . First, for those functions the BOC provides to competing carriers that are analogous to the functions a BOC provides to itself in connection with its own retail service offerings, the BOC must provide access to competing carriers in "substantially the same time and manner" as it provides to itself. Thus, where a retail analogue exists, a BOC must provide access that is equal to (*i.e.*, substantially the same as) the level of access that the BOC provides itself, its customers, or its affiliates, in terms of quality, accuracy, and timeliness. For those functions that have no retail analogue, the BOC must demonstrate that the access it provides to competing carriers would offer an efficient carrier a "meaningful opportunity to compete."

We do not view the "meaningful opportunity to compete" standard to be a weaker test than the "substantially the same time and manner" standard. Where the BOC provides functions to its competitors that it also provides for itself in connection with its retail service, its actual performance can be measured to determine whether it is providing access to its competitors in "substantially the same time and manner" as it does to itself. Where the BOC, however, does not provide a retail service that is similar to its wholesale service, its actual performance with respect to competitors cannot be measured against how it performs for itself because the BOC does not perform analogous activities for itself. In those situations, our examination of whether the quality of access provided to competitors offers "a meaningful opportunity to compete" is intended to be a proxy for whether access is being provided in substantially the

same time and manner and, thus, is nondiscriminatory.

Finally, we note that a determination of whether the statutory standard is met is ultimately a judgment we must make based on our expertise in promoting competition in local markets and in telecommunications regulation generally. We have not established, nor do we believe it appropriate to establish, specific objective criteria for what constitutes “substantially the same time and manner” or a “meaningful opportunity to compete.” We look at each application on a case-by-case basis and consider the totality of the circumstances, including the origin and quality of the information before us, to determine whether the nondiscrimination requirements of the Act are met. Whether this legal standard is met can only be decided based on an analysis of specific facts and circumstances.<sup>6</sup> (Citations omitted).

## TRACK A

***Does Southwestern Bell Telephone Company meet the requirements to seek in-region, inter-LATA authority in the state of Missouri by means of 47 U.S.C. § 271(CC)(1)(A) (“Track A”)?***

***Yes.***

In this case, Southwestern Bell Telephone Company (“SWBT”), a BOC, is seeking section 271 authority by means of Track A. Track A requires that the BOC have an interconnection agreement with one or more facilities-based competitive local exchange carriers (“CLECs”) that provide, either exclusively or predominately over their own facilities, telephone exchange service to residential and business subscribers.<sup>7</sup> SWBT has interconnection agreements with one or more such CLECs in the state of Missouri.<sup>8</sup>

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<sup>6</sup> SBC Texas Order ¶¶ 22 & 44-46.

<sup>7</sup> SBC Texas Order ¶ 59.

<sup>8</sup> Brooks Fiber, TCG St. Louis, ACSI and Intermedia are all facilities-based CLECs unaffiliated with SWBT that have interconnection agreements with SWBT and that are providing competing telephone exchange services to residential and/or business subscribers in SWBT’s service area. (Rebuttal Testimony of William L. Voight, Ex. \_\_\_, p. 7, 1.3 to p. 8, 1.15 & Sch. 3).

It has been the Staff's position, at least since the filing of its post-hearing brief on or about March 24, 1999, that SWBT meets the requirements of Track A.<sup>9</sup>

It is the Staff's position that SWBT still satisfies the requirements of Track A. As of August 2000, competitors in SWBT's Missouri service area served 247,355 business and residential access lines via facilities-based service (either through UNEs or a carrier's exclusively owned facilities) and 80,902 business and residential lines via resale of SWBT facilities. The total, 328,257 residential and business access lines, represents approximately 12 percent of SWBT's total Missouri access lines and reflects an adjustment by the Staff to reflect digital equivalent voice grade access lines for both SWBT and competitors.<sup>10</sup>

For residential service, AT&T is the only competitor providing facilities-based service to residential customers as of the August 2000 timeframe. AT&T provides basic local exchange telephone service to residential subscribers exclusively over AT&T's cable telephony facilities. AT&T began a cable telephony market readiness test on a limited basis on November 26, 1999. AT&T made cable telephony service commercially available in part of its Missouri franchised service areas on June 25, 2000. At this time, AT&T's cable telephony services are available only in the St. Louis area. The actual number of AT&T's residential cable telephony subscribers, while known to the Staff, is highly confidential to AT&T and has not been publicly disclosed.

The Staff acknowledges the potential existence of a small degree of competitive residential facilities-based service in Missouri taking place by means of UNEs. In order to obtain the most recent data, the Staff has submitted a data request to SWBT requesting additional

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<sup>9</sup> Staff's Post-Hearing Brief Filed March 24, 1999 at pp. 4-10.

<sup>10</sup> Tr. 3097; see also Affidavit of William L. Voight filed October 26, 2000 at ¶ 23.

information on the extent of competitive business and residential UNE based service. Staff efforts are designed to determine whether residential UNE based service represents actual paying customers, or whether such service is *de minimus* and likely attributable to non-paying employees and/or family members of competitors. Regardless, between the combination of: (1) AT&T's facilities-based residential cable telephony offerings, (2) widespread facilities-based business competition, (3) widespread resale of business and residential services, and (4) over 112 Commission-approved interconnection/resale agreements offered by SWBT, the Staff has no doubt that actual commercial alternatives exist in SWBT's Missouri service area for both business and residential services. As such, SWBT still satisfies the requirements to seek section 271 authority by means of Track A.

## COMPETITIVE CHECKLIST

### Checklist Item 1 – Interconnection

***Does Southwestern Bell Telephone Company meet the requirements of Checklist Item 1?***

***No.***

Section 271(c)(2)(B)(i) of the Act states that a BOC must provide “[i]nterconnection in accordance with the requirements of sections 251(c)(2) and 252(d)(1) . . . .”<sup>11</sup>

. . . . Section 251 contains three requirements for the provision of interconnection. First, an incumbent LEC must provide interconnection “at any technically feasible point within the carrier’s network.” Second, an incumbent LEC must provide interconnection that is “at least equal in quality to that provided by the local exchange carrier to itself.” Finally, the incumbent LEC must provide interconnection “on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms of the agreement and the requirements of [section 251] and section 252.”<sup>12</sup> (Citations

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<sup>11</sup> 47 U.S.C. 271(c)(2)(B)(i).

<sup>12</sup> *SBC Texas Order* at ¶ 61.

omitted).

. . . . Competing carriers may choose any method of technically feasible interconnection at a particular point on the incumbent LEC's network. Incumbent LEC provision of interconnection trunking is one common means of interconnection. Technically feasible methods also include, but are not limited to, physical and virtual collocation and meet point arrangements. **The provision of collocation is an essential prerequisite to demonstrating compliance with item 1 of the competitive checklist.** In the *Advanced Services First Report and Order*, the Commission revised its collocation rules to require incumbent LECs to include shared cage and cageless collocation arrangements as part of their physical collocation offerings. To show compliance with its collocation obligations, a BOC must have processes and procedures in place to ensure that all applicable collocation arrangements are available on terms and conditions that are "just, reasonable, and nondiscriminatory" in accordance with section 251(c)(6) and our [the FCC's] implementing rules.<sup>13</sup> (Citations omitted; emphasis added).

In its *SBC Texas Order*, the FCC focused on performance measures for trunk blockage, missed due dates and average installation intervals in evaluating SWBT interconnection trunking in Texas. The FCC also noted that the Texas Public Utility Commission ("TPUC") agreed with SWBT that SWBT's collocation offering complied with the FCC's *Advanced Services First Report and Order*<sup>14</sup> and that the "offering underwent an active and thorough review at the state level" where the TPUC "addressed the provisioning of collocation space and established standard provisioning intervals for caged, cageless and virtual collocation."<sup>15</sup> As the FCC, subsequently, in October of 2000, issued its *Advanced Services Order on Reconsideration*,<sup>16</sup> SWBT should show that its offering complies with the FCC's order on reconsideration.

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<sup>13</sup> *SBC Texas Order* at ¶ 64.

<sup>14</sup> CC Docket 98-147; FCC 99-99-48 (3/31/99).

<sup>15</sup> *SBC Texas Order* at ¶ 74.

<sup>16</sup> CC Docket 98-147, pp. 96-98; FCC 00-297 (8/10/00).

Section 251, and our [FCC] implementing rules, require an incumbent LEC to allow a competitive LEC to interconnect at any technically feasible point. This means that a competitive LEC has the option to interconnect at only one technically feasible point in each LATA. The incumbent LEC is relieved of its obligation to provide interconnection at a particular point in its network only if it proves to the state public utility commission that interconnection at that point is technically infeasible.<sup>17</sup>

### **Pricing of interconnection**

BOC's are required to provide interconnection on "rates, terms and conditions that are just, reasonable, and nondiscriminatory."<sup>18</sup> The FCC's pricing rules require that BOCs provide collocation based on the total element, long-run and incremental cost ("TELRIC").<sup>19</sup> Use of interim pricing did not prove fatal to SWBT's application in Texas where the FCC found the following circumstances were met:

[T]he mere presence of interim rates will not generally threaten a section 271 application so long as an interim solution to a particular rate dispute is reasonable under the circumstances, the state commission has demonstrated its commitment to our pricing rules, and provision is made for refunds or true-ups once permanent rates are set.<sup>20</sup>

As ordered by the Commission in Case No. TO-97-40, SWBT's collocation rates in Missouri presently are determined on an individual case basis ("ICB"), i.e., case-by-case. ICB rates for collocation do not meet the requirement to provide interconnection at "rates, terms and conditions that are just, reasonable and nondiscriminatory."<sup>21</sup>

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<sup>17</sup> *SBC Texas Order* at ¶ 78.

<sup>18</sup> 47 U.S.C. Section 251(c)(2).

<sup>19</sup> *SBC Texas Order*, at ¶ 80.

<sup>20</sup> *Texas Order* at ¶ 88.

<sup>21</sup> Staff's post-hearing brief filed March 24, 1999, p. 12, citing to *Application of BellSouth Corporation et al. for Provision of In-Region, Inter-LATA Services in Louisiana*, CC Docket No. 98-121, FCC 98-271, Memorandum Opinion and Order, 13 F.C.C.R. 20599 (October 13, 1998) (Second BellSouth Louisiana Order) at ¶ 61.

In its March 24, 1999, post-hearing brief,<sup>22</sup> the Staff stated the following:

Further, SWBT cannot demonstrate that it has provided interconnection to CLEC's that is at least equal in quality to what it provides to itself or to any affiliate. According to the testimony of Larry Barnes, SWBT cannot demonstrate that it is providing physical or virtual collocation in a manner that is consistent with §§ 271(c)(2)(B)(i), 251(c)(2), and 252(d)(1) of the Act.<sup>23</sup> Testimony was provided suggesting SWBT has failed to offer reasonable and nondiscriminatory access to "cageless" or other alternative physical collocation arrangements.<sup>24</sup> According to Mr. Barnes, "cageless" collocation, or some other manner of collocation that does not involve the complete segregation of all CLEC facilities, will result in providing CLECs with access to interconnection and UNEs at lower costs. It will also provide for a more efficient use of the limited resource, namely space, available in SWBT central offices.<sup>25</sup> SWBT's evidence is insufficient for the Commission to find that CLECs in Missouri have just, reasonable, and nondiscriminatory access to physical collocation.

According to the testimony of Michael C. Auinbauh, SWBT is offering virtual collocation under the terms, conditions and rates as specified in SWBT's **federal** collocation tariff.<sup>26</sup> However, as with physical collocation, SWBT does not provide virtual collocation at "rates, terms and conditions that are just, reasonable, and nondiscriminatory."<sup>27</sup>

MCI Telecommunications ("MCIW") witness, Ronald Martinez testified to instances where the NXX codes of one or more of the MCIW Companies were not properly loaded into the SWBT switches. This failure had the effect of rendering some of the telephone numbers assigned to MCIW customers inoperable.<sup>28</sup>

Additional concerns were raised by Steven J. Gaul, testifying on behalf of Brooks Fiber Communications of Missouri, Inc. ("Brooks Fiber").<sup>29</sup> Brooks Fiber experienced blocking of incoming traffic from SWBT. According to Mr.

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<sup>22</sup> Staff's post-hearing brief filed March 24, 1999, pp. 12-14.

<sup>23</sup> Barnes Rebuttal (adopted by Falcone), Ex. 71, p. 6.

<sup>24</sup> Id. at 8.

<sup>25</sup> Id. at 9.

<sup>26</sup> Auinbauh Direct, Ex. 4, p. 19.

<sup>27</sup> *Second Bell South Louisiana Order* at ¶ 61.

<sup>28</sup> Martinez Rebuttal, Ex. 68, pp. 8-11.

<sup>29</sup> Brooks Fiber is now part of what has been referred to herein as the MCIW companies.

Gaul, the blocked traffic was a direct result of the failure of SWBT to deploy sufficient inbound interconnection trunks to MCIW switches.<sup>30</sup>

Although SWBT, on October 24, 2000, filed a collocation tariff in Missouri with concrete rates, terms and conditions, the Staff believes that SWBT cannot satisfy Checklist Item 1 by means of that tariff until this Commission has examined that tariff and found that it meets TELRIC standards and is just, reasonable and nondiscriminatory. The Commission has suspended SWBT's collocation tariff on the motion of Gabriel Communications of Missouri, Inc. creating Case No. TT-2001-298. While SWBT supports its tariff filing with a SWBT "statewide average" cost study, the Commission has not yet addressed that study. Presently, the Staff is analyzing that study in preparation of providing its input to the Commission. Although the Commission has not yet set a procedural schedule, the parties have proposed that the Commission conduct an evidentiary hearing in Case No. TT-2001-298 during March 28-30, 2001.

Meanwhile, contingent upon Commission approval of SWBT's application for section 271 authority in this case, SWBT proposes to provide concrete rates, terms and conditions for collocation by SWBT to competitors in Missouri by means of SWBT's M2A. In addition to the terms stated in the latest version of its M2A, SWBT also has offered to the Commission to make available in Missouri, on an interim basis, the terms of the collocation tariff the Kansas Corporation Commission (KCC) recently approved on an interim basis. SWBT has presented the KCC approved interim tariff to the FCC in SWBT's section 271 application to the FCC for the state of Kansas. Both of these proposals to the Commission suffer from the same infirmities as the collocation tariff SWBT filed in Missouri -- they contain proposed rates that

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<sup>30</sup> Gaul Rebuttal, Ex. 70, pp. 6-7.



this Commission has not reviewed and found to be TELRIC-based and this Commission has not determined they contain rates, terms and conditions that are just, reasonable and nondiscriminatory. The Staff considers the present state of the record in this case to be insufficient for the Commission to make these determinations; therefore, presently, SWBT does not meet this checklist item.

In its *SBC Texas Order*, the FCC stated the following:

We stress that we place great weight on the Texas Commission's active review of SWBT's pricing elements in its 271 application. The Texas Commission has encouraged active and open participation by all carriers in setting rates through numerous proceedings, reviewed costs studies and conflicting testimonies, arbitrated pricing issues and incorporated its findings into interconnection agreements, and **has demonstrated its commitment to applying the pricing standards of sections 251 and 252 of the Act as implemented by our rules.**<sup>31</sup> (Citations omitted; emphasis added).

In the face of AT&T's argument that interim caged collocation rates established by the TPUC were not TELRIC-based, and instead were based on outdated tariffs which included costs for things that the FCC had subsequently found to be improper, the FCC viewed the TPUC's actions of using the old rates, reducing one by 30% as an adjustment for the subsequent FCC findings, "as a reasonable attempt by the state commission to set an interim TELRIC-based rate pending its final determination."<sup>32</sup> Further, the FCC noted that the TPUC had "based the majority of the interim rates, at least with regard to physical collocation, from a TELRIC model developed by AT&T and MCI, albeit with some modifications."<sup>33</sup> Significantly, the FCC also stated the following:

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<sup>31</sup> *SBC Texas Order* at ¶ 84.

<sup>32</sup> *SBC Texas Orde*, at ¶ 89.

<sup>33</sup> *SBC Texas Order* at ¶ 89.

The Texas Commission has set up a schedule to set permanent rates, and has indicated to the parties that the interim rates are subject to a refund or true-up, an approach apparently urged by AT&T. AT&T acknowledges that the Texas Commission has directed use of the AT&T/MCI model in setting permanent physical and virtual collocation rates. Further cost studies were due April 12, 2000, and a hearing was scheduled for June 15-16, 2000. Based on the record, we believe that the Texas Commission has taken a reasonable approach. We conclude that the uncertainty surrounding the interim rates has been minimized, and we have confidence that the Texas Commission will set permanent rates that are in compliance with the Act and our rules. Consequently, we find that SWBT has met its obligations under this checklist item.<sup>34</sup>

In light of all the foregoing it is the Staff's position that the simplest, best and most expedient approach to this issue is for the FCC-approved Texas collocation tariff to be in place on an interim basis, subject to true-up, until such time as permanent rates, terms and conditions in Missouri are determined in Case No. TT-2001-298. Again, because SWBT has not met its burden of demonstrating that its collocation offerings made in this case are nondiscriminatory and in conformance with TELRIC standards, the Staff does not believe SWBT meets Checklist Item 1.

Although SWBT's interconnection provisions in M2A do contain concrete rates, terms and conditions to establish a single Point of Interconnection (POI) within the metropolitan calling areas of Missouri, SWBT fails to offer such concrete rates, terms and conditions for a LATA-wide single POI in Missouri. Rather, SWBT offers competitors an opportunity to "negotiate" rates, terms, and conditions for a LATA-wide single POI in Missouri.

Although, as of yet the FCC has not required concrete rates, terms and conditions for a LATA-wide single POI, Staff suggests such requirements were made of SWBT by this Commission in Case No. TO-97-40. The Staff suggests that, should the Commission approve

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<sup>34</sup> *SBC Texas Order* at ¶ 90.

an M2A, the Commission require SWBT to fully incorporate the terms of this Commission's arbitration award in Case No. TO-97-40 into that M2A for the purpose of rates to provision LATA-wide single POIs.

## **Checklist Item 2 – Unbundled Network Elements**

### ***Does Southwestern Bell Telephone Company meet the requirements of Checklist Item 2?***

*No.*

The Staff's position on Checklist Item 2 in March of 1999, was that SWBT did not meet the requirements of the checklist item based on the requirement that competitors must use a form of hardware connectivity not required of SWBT's own end-users.<sup>35</sup>

It is the Staff's current position that SWBT does not meet this checklist item because not all of the unbundled network element (UNE) rates it proposes have been reviewed for conformance to TELRIC standards and various FCC pricing guidelines. This is true of a number of UNE rates proposed by SWBT in its M2A. The Commission has reviewed a number of SWBT UNE rates in arbitrations of interconnection agreements and the Staff is of the view that these UNE rates are TELRIC-based and in conformance with FCC pricing guidelines. Many of these are found in M2A. However, a number of SWBT UNE rates found in SWBT's M2A and not elsewhere, while asserted by SWBT to be TELRIC-based, have not undergone Commission scrutiny.

### **Case No. TO-97-40.**

SWBT offers rates for certain UNEs that are consistent with the Commission's order establishing permanent prices for those UNEs in Case No. TO-97-40. The Staff believes the

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<sup>35</sup> Staff's Post-Hearing Brief filed March 24, 1999, at pp. 18-26.